“Sport Sex” before the European Court of Human Rights

Michele Krech 2021-03-22T14:00:18

Sport is the field par excellence in which discrimination against intersex people has been made most visible.

Commissioner for Human Rights, Council of Europe
Issue Paper: Human rights and intersex people (2015)

Olympic and world champion athlete Caster Semenya is asking the European Court of Human Rights (ECtHR) to make sure all women athletes are “allowed to run free, for once and for all”. Semenya brings her application against Switzerland, which has allowed a private sport association and a private sport court to decide – with only the most minimal appellate review by a national judicial authority – what it takes for women, legally and socially identified as such all their lives, to count as women in the context of athletics. I consider how Semenya’s application might bring human rights, sex, and sport into conversation in ways not yet seen in a judicial forum.

Background

Semenya, a South African national, competes in the sport of track and field, which is governed internationally by a private association, World Athletics, headquartered in Monaco. A few years ago, World Athletics introduced new Regulations barring women with innate variations of sex characteristics from competing in certain women’s events, unless they medically reduce their atypically high testosterone levels. Semenya first challenged the Regulations before the Court of Arbitration for Sport (CAS) – an international arbitral tribunal located in Switzerland and commonly known as the “supreme court of sport”. After the majority of the CAS panel upheld the Regulations, Semenya appealed to Switzerland’s highest judicial authority, the Swiss Federal Tribunal (SFT), which dismissed her claim, leaving the Regulations – and “sport sex” – in place.

All the while, the UN Human Rights Council‘s independent experts and the UN High Commissioner for Human Rights, along with Human Rights Watch, the World Medical Association, and various organizations focused on women’s and LGBTQI+ equality in sport, have expressed serious concern that the Regulations contravene international human rights norms and standards. However, no court has squarely decided this question. The CAS panel measured the Regulations against the non-discrimination provisions of the World Athletics Constitution and the Olympic Charter (para. 424), finding it unnecessary to delve into the “detailed principles” of “international human rights law including those that apply in Monaco … and the domestic laws of many countries in which [World Athletics] has members and holds international competitions” (para. 544). Whether the Regulations were contrary to such laws was deemed a matter for the courts of those jurisdictions to decide

(para. 555). But because the CAS decision is an international arbitral award, the SFT was restricted, pursuant to the Federal Statute on Private International Law, to reviewing only one substantive ground of appeal: whether the CAS decision was compatible with Swiss public policy (i.e. the most fundamental values that, according to prevailing opinions in Switzerland, should form the basis of any legal order). As the SFT explained, while the principles underpinning the Swiss Constitution or the European Convention of Human Rights (ECHR) could be considered when defining public policy, the provisions of these instruments could not be directly invoked to challenge the CAS decision (paras. 9.1 to 9.2).

The ECtHR's consideration of Semenya's application will therefore mark the first time a court evaluates the private regulations of World Athletics (and, particularly, the role of Switzerland in upholding them) against international human rights law. It may also mark the first time the ECtHR decides a case of discrimination based on sex characteristics. Given such novelty, what else might be new and different before the ECtHR compared to the past (quasi)judicial processes? I consider this question in two (intricately connected) parts – the facts and the law – where the ECtHR could play a remedial role.

The Facts: Sex before the ECtHR

The CAS panel characterized the case as one of "significant scientific complexity" and remarked on both the lack of consensus among experts and the "paucity of evidence" regarding certain matters concerning the effect of testosterone on the athletic performance (para. 582). The majority of the panel found, however, that the totality of the evidence provided adequate support for World Athletics' claim that the women targeted by the Regulations "enjoy a significant performance advantage over other female athletes, which is of such magnitude as to be capable of subverting fair competition within the female category" (para. 538). This finding was also central to decision of the SFT, which was bound to rule based on the facts found by the CAS. The SFT made clear that, pursuant to its own constitutive law, it could not correct or supplement the arbitrators' findings, even if the facts had been established in a manifestly incorrect manner or in violation of the law (para. 5.2.2).

Meanwhile, abundant scholarly critiques have been registered against World Athletics' evidence, ranging from the methodologies used to the conclusions drawn. Moreover, much of this evidence was produced "in-house" by World Athletics; the leaders of its own Health and Science Department conducted the main scientific study relied on to justify the Regulations. Without delving deeper into this apparent lack of independence, it is notable that the conflated "scientific" and "legislative" process here is a private one; no Swiss public authority sought evidence to inform or evaluate the regulatory decision at issue.

To what extent, then, might the ECtHR reassess the evidence? While the Court was not set up as a court of first or fourth instance – that is, to establish the basic facts of a case or to re-evaluate the facts established by a domestic court – it does require parties to substantiate their claims, and is free to assess the admissibility, relevance, and probative value of the evidence put forth. The Court may request additional evidence, draw inferences from the absence of evidence, and even engage in fact-

finding if the evidence is contested or unclear. To resolve uncertainty, the Court may rely on evidence from external actors, including experts and academics, as well as a wide variety of third-party interveners.

Considering this range of evidence would reveal that understandings of sex in athletics cannot be detached from understandings of sex beyond the sports sphere. Indeed, sport has been shown to be especially effective at disguising and transmitting socio-scientific ideologies – including those related to testosterone – as self-evident truth. While there are limits to the ECtHR's ability to decide complex socio-scientific questions, it need not accept factual findings made (tenuously) by the CAS and not by Switzerland. Moreover, it should become clear to the ECtHR that "science" cannot provide a definitive answer to the question before it; in fact, the (selective) way science has been deployed by World Athletics is at the very heart of the alleged human rights violations.

The Law: Sport before the ECtHR

A number of rights guaranteed by the ECHR are pertinent in Semenya's case. Most obvious is Article 8, which encompasses the right to personal autonomy and identity, including physical, psychological, and moral integrity. The "impossible choices" and documented harms inherent in the Regulations clearly interfere with this right. In addition, Article 14 requires member States to secure to everyone within their jurisdiction all Convention rights "without discrimination on any ground". The Regulations apply only to women with certain sex characteristics (which the Commissioner for Human Rights has said fall under sex as a prohibited ground of discrimination) and arguably exhibit racial and regional bias.

Whatever Convention rights are invoked, the ECtHR will have to decide whether any infringement is legally justifiable. To begin, any potential infringement of Article 8 must be "in accordance with the law" – that is, it must have some basis in domestic law. However, unlike antidoping rules enacted by public authorities – which the ECtHR has held meet this test – the Regulations at issue in Semenya's case are not part of Swiss law or based on any international treaty. Switzerland will therefore be in the strange position of defending Regulations enacted by a private association located in Monaco.

In this regard, Switzerland will have to establish that the Regulations pursue one of the legitimate aims identified in the ECHR. The ECtHR has previously recognized "fair play and equality of opportunity" in sport as constituting such an aim. More critically, however, Switzerland will have to establish that the Regulations are "necessary in a democratic society" to achieve this aim. In addition to the evidentiary shortcomings discussed already, it is not clear that the Regulations serve a "pressing social need" like antidoping "whereabouts" rules do, according to the ECtHR. The need for the latter was based on abundant State-adduced evidence that doping harms the physical and mental health of athletes and sets a dangerous example for youth. The "danger" that Switzerland is seeking (or allowing World Athletics) to avoid in Semenya's case is much less apparent. In fact, it is Semenya and other athletes targeted by the Regulations, as well as the youth that look up to them, that are put most at risk.

It therefore cannot be said that the ECtHR has established a blanket principle that the pursuit of fairness can justify serious infringements of athletes' rights, as the SFT implied in its decision (para. 9.8.3.3). Surely *mandating* medically unnecessary drug use (or surgery) for certain athletes, as a condition of eligibility for the female category of competition, is not analogous to *prohibiting* it (with therapeutic use exemptions) for all athletes.

In any case, the ECtHR's practice is to "balance" individual interests and the interests of the community as a whole. But who makes up the relevant community? The majority of the CAS panel found, for example, that because of "constraints on the [its] competence and role" it was neither necessary nor appropriate for it to consider "the possible wider impact" of the Regulations outside the "segment of society" governed by World Athletics (para. 589). However, it is not just Semenya's athletic career, but her entire life, that is affected by the Regulations. Likewise, it is not just elite women athletes without intersex traits who comprise the community with interests at stake (and little evidence has been adduced to characterize these interests). A much broader community may have an interest in seeing the unhindered potential of every athlete on display, and the whole of the LGBTQI + community may have an interest in avoiding the stigmatization that flows from mandatory "normalization" procedures in any sphere of life. The fact that sport is "a massively visible social practice, extensively relayed worldwide" makes it all the more important which community or communities are counted and valued in the Court's assessment.

Finally, the scope of the relevant community will also be important to the ECtHR's consideration of whether there is a relevant European consensus, which in turn informs how great a "margin of appreciation" (i.e. degree of deference) is to be granted to Switzerland. There may be a common European approach reflected in the calls of the Commissioner for Human Rights and the Parliamentary Assembly to end medically unnecessary sex-"normalizing" interventions without free and fully informed consent. When it comes to sport eligibility rules, though, it could be said that the common approach is to defer to private international governing bodies like World Athletics. But any such "consensus by omission" only highlights the structural failure of States to uphold – proactively, where necessary – human rights in the context of sport. Indeed, World Athletics' Regulations prevent any consensus (or lack thereof) from emerging among States by restricting athletes' access to domestic courts. Therefore, Switzerland – as the home of the CAS – and the SFT – as the judicial authority with exclusive jurisdiction to review CAS awards – would seem to have a unique responsibility to secure the human rights of athletes. In other words, because Switzerland is effectively speaking for a worldwide community, its margin of appreciation should be very narrow.

When it comes time for the ECtHR to consider the merits of Semenya's application, it will have to decide whether the paradoxical concept of "sport sex", as upheld by the SFT, can be sustained in accordance with the ECHR. The limitations of the judicial processes to date point to the potential – if not the promise – of the ECtHR to (re)consider the full range of facts and to directly apply human rights law within

athletics. Whatever the ECtHR decides, its decision will have significant implications far beyond both Switzerland and sport.

The author gratefully acknowledges Gráinne de Búrca, Antoine Duval, Katrina Karkazis, and Gabriele Wadlig for their input on this piece.
